

***Blank Page***

**FILE COPY**

Office - Supreme Court, U. S.

**FILED**

**APR 10 1940**

**CHARLES ELMORE CROPLEY**  
CLERK

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1939**

---

**No. 46**

---

**STATE OF WISCONSIN AND ELMER E. BARLOW, AS**  
**COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,**  
*Petitioners,*

*vs.*

**J. C. PENNEY COMPANY, A DELAWARE CORPORATION.**

---

**PETITION FOR WRIT OF CERTIORARI TO THE**  
**SUPREME COURT OF THE STATE OF WISCONSIN.**

---

**JOHN E. MARTIN,**  
*Attorney General of Wisconsin,*  
**JAMES WARD RECTOR,**

*Deputy Attorney General of Wisconsin,*  
**HAROLD H. PERSONS,**  
*Assistant Attorney General of Wisconsin,*  
*Counsel for Petitioners.*

***Blank Page***

## INDEX.

### SUBJECT INDEX.

	Page
Petition for writ of certiorari .....	1
Summary statement of the matter involved .....	1
Reasons relied on for the allowance of the writ .....	6
Prayer for the writ .....	10
Brief in support of petition for writ of certiorari .....	11
I. The opinion of the court below .....	11
II. Jurisdiction .....	11
III. Statement of the case .....	14
IV. Specification of errors .....	16
V. Argument .....	17
Summary of argument .....	17
Point A. The Supreme Court of Wisconsin erroneously predicated its decision on the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), upon the de- cision of this Court in <i>Connecticut</i> <i>General Life Ins. Co. v. Johnson</i> , 303 U. S. 77, 82 L. Ed. 673, 58 Sup. Ct. 436 (1938) .....	17, 18
Point B. This Court has announced no deci- sion construing the Fourteenth Amendment condemning the ap- plication of State tax laws, such as Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), to foreign corporations doing busi- ness in the State in the manner of the J. C. Penney Company .....	17, 19
Point C. On the contrary, applicable deci- sions of this Court sustain the validity of said Section 3 of Chap- ter 505, Laws of Wisconsin, 1935 (as amended), as applied to the J. C. Penney Company in the present case .....	18, 20
Conclusion .....	23



	Page
Appendix setting out Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended .....	25

## TABLE OF CASES CITED.

<i>American Manufacturing Co. v. St. Louis</i> (1929), 250 U. S. 459, 63 L. Ed. 1084, 39 Sup. Ct. 522 .....	21
<i>Atlantic Lumber Co. v. Commissioner of Corporations and Taxation</i> (1936), 298 U. S. 553, 80 L. Ed. 1328, 56 Sup. Ct. 887 .....	21
<i>Barnes v. The Railroads</i> (1873), 17 Wall. (84 U. S.) 294, 21 L. Ed. 544 .....	22
<i>Blodgett v. Silberman</i> (1928), 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410 .....	14
<i>Boynnton v. Hutchinson Gas Co.</i> (1934), 291 U. S. 656, 78 L. Ed. 1049, 54 Sup. Ct. 528 .....	14
<i>Coleman v. Miller</i> (1939), 307 U. S. 433, 83 L. Ed. 1385, 59 Sup. Ct. 972 .....	14
<i>Connecticut General Life Ins. Co. v. Johnson</i> (1938), 303 U. S. 77, 82 L. Ed. 673, 58 Sup. Ct. 436 9, 13, 14, 18, 19	19
<i>Kelly v. Washington ex rel. Foss Company</i> (1937), 302 U. S. 1, 82 L. Ed. 3, 58 Sup. Ct. 87 .....	14
<i>Miller v. Milwaukee</i> (1927), 272 U. S. 713, 71 L. Ed. 487, 47 Sup. Ct. 280 .....	23
<i>Railroad Company v. Collector</i> (1879) X Otto (100 U. S. 595, 25 L. Ed. 647 .....	22
<i>Shaffer v. Carter</i> (1920), 252 U. S. 37, 64 L. Ed. 445, 40 Sup. Ct. 221 .....	20
<i>State ex rel. Froedtert G. &amp; M. Co., Inc., v. Tax Commission</i> (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 .....	8, 9, 13, 19, 20, 21
<i>Stockdale v. Atlantic Insurance Co.</i> (1874), 20 Wall. (87 U. S.) 323 .....	22
<i>Underwood Typewriter Co. v. Chamberlain</i> (1920), 254 U. S. 113, 65 L. Ed. 165, 41 Sup. Ct. 45 .....	21
<i>United States v. Railroad Company</i> (1873), 17 Wall. (84 U. S.) 322, 21 L. Ed. 597 .....	22

## TABLE OF STATUTES CITED.

Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended by Chapter 52, Laws of Wisconsin, 1935, 2, 5, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20
---

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1939**

---

**No. 892**

---

**STATE OF WISCONSIN AND ELMER E. BARLOW; AS  
COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,**  
*Petitioners,*

*vs.*

**J. C. PENNEY COMPANY, A DELAWARE CORPORATION.**

---

**PETITION FOR WRIT OF CERTIORARI.**

---

May It Please the Court:

The petition of the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, respectfully shows to this Honorable Court:

**A.**

**Summary Statement of the Matter Involved.**

This petition is filed to obtain a review of the judgment of the Supreme Court of the State of Wisconsin, dated January 16, 1940, in the case of *J. C. Penney Co., a foreign corporation v. Wisconsin Tax Commission*, holding invalid an assessment of taxes against the J. C. Penney Company, a

Delaware corporation, doing business in the State of Wisconsin pursuant to the laws thereof. The said judgment of the Supreme Court of the State of Wisconsin reversed a judgment of the Circuit Court for Dane County, Wisconsin, confirming an assessment of said taxes against said J. C. Penney Company, a corporation, as affirmed by a decision and order of the Wisconsin Tax Commission, dated July 21, 1938 (R. 77).

The taxes involved, in the sum of \$23,586.79, were assessed pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which imposes a tax upon corporate dividends paid out of income derived from property located or business transacted in the State of Wisconsin. A copy of said Section 3 of Chapter 505, Laws of Wisconsin of 1935, effective upon its publication on September 26, 1935, and as amended by Chapter 552, Laws of Wisconsin of 1935, effective upon publication thereof on October 8, 1935, is printed as an Appendix to this petition.

Said taxing statute is a special act and imposes a tax on "all corporations (foreign and local)" "equal to two and one-half per centum of the amount of" dividends declared and paid, after the passage thereof and prior to July 1, 1937, out of income derived from property located and business transacted in Wisconsin. It provides that such tax shall be deducted and withheld by the corporation from the dividends paid to both residents and nonresidents of Wisconsin and that the corporation is made liable for the tax and the payment thereof.

In subsection (4) thereof it is specifically provided that as to corporations doing business within and without the State of Wisconsin the tax shall apply only to dividends declared and paid out of income derived from business transacted and property located in Wisconsin and that the amount of income of such a corporation attributable to the State of Wisconsin shall be computed in the same manner



as is provided in Chapter 71 of the Wisconsin Statutes, the general Income Tax Law of the State of Wisconsin, for the determination of the income of such type of corporations allocable as Wisconsin income.

The facts involved and upon which the Supreme Court of the State of Wisconsin based its decision and judgment are not in dispute and are set forth in the majority opinion (R. 78).

The J. C. Penny Company is a Delaware corporation, having its statutory office at Wilmington, Delaware (R. 26). It is engaged in the business of operating a nationwide chain of retail department stores, approximately 1500 in number. It is licensed to do business in the State of Wisconsin but has no executive office of any kind located within the State (R. 27). During the year 1934 it operated 47 stores in Wisconsin. In 1935 and 1936 it operated 48 stores in Wisconsin (R. 28). During the year 1934, the corporation had a total net income computed on the Wisconsin tax basis of \$16,022,607, and in 1935, a total net income of \$15,223,478. Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes (1935)) \$562,331. of the 1934 income was allocable to Wisconsin business and \$587,000. of the 1935 income was allocable to Wisconsin business (R. 46).

On December 31, 1935, the J. C. Penny Company declared a dividend of \$2.25 per share, making total dividend payments of \$5,555,214.00 (R. 45).

In 1936, it declared and paid the following dividends (R. 45):

Date Paid	Amount per share	Total Amount Paid to Stockholders
3/31/36.	\$ .75	\$1,851,738.00
6/30/36	.75	1,851,738.00
9/30/36	1.00	2,468,984.00
12/15/36	4.75	11,727,674.00

4

The J. C. Penney Company operates its business in the following manner: the total proceeds from sales of goods in all its stores, including Wisconsin stores, are deposited in local banks. From such deposits payments are made by the local store managers for payrolls, rents, advertising and other local expenses. The remainder not needed for such expenses is ultimately transferred to the treasurer's office in New York City and deposited in New York banks to the credit of the corporation. No separate account is kept of the funds from the various States and moneys after leaving the local banks completely lose their identity with respect to being derived from a particular source. From the funds deposited in New York, salaries, general overhead expenses in New York and other offices, taxes and dividends are paid. Checks are also drawn thereon in payment for all merchandise purchased and shipped to the various stores (R. 29). All of the stockbooks, minute books and secretary's records of the corporation are kept in the State of New York, except that a duplicate stock ledger is kept in Delaware as required by that State. All transfers of shares of stock are made by the New York transfer agent of the corporation; all directors and stockholders' meetings are held in the State of New York and all dividends are declared at such meetings (R. 30). The actual payment of dividends is effected by checks drawn upon the accounts of the corporation in New York, payable to the stockholders of record upon each dividend record date. Such checks are mailed to the postoffice address of each stockholder as the same appears in the record. No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received their mail in Wisconsin (R. 32). As of the date of payment of the December 31, 1935 dividend 391



stockholders were residents of the State of Wisconsin as against a total of 12,385 stockholders. With respect to the dividend paid on December 15, 1936, there were 405 Wisconsin stockholders as against a total of 13,281 stockholders. (R. 51)

Pursuant to a notice of an additional assessment dated July 16, 1937, in accordance with the procedural provisions of the Wisconsin statutes, the Wisconsin Tax Commission assessed a tax against the said J. C. Penney Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of \$23,586.79 (R. 43 and 49). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 51). Thereupon the matter was heard by the Wisconsin Tax Commission and on July 21, 1938 it entered a decision and order sustaining the assessment of said taxes in the amount of \$23,586.79 (R. 19).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation and pursuant to the provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939 judgment was entered therein confirming the same (R. 69). Upon appeal therefrom by the J. C. Penney Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940 rendered its decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said J. C. Penney Company, under the facts as stated, were invalid as depriving the said J. C. Penney

Company, a corporation, of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States (R. 77). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is here sought to be reviewed.

The record upon which this petition is here presented is composed of the printed case as used in the Supreme Court of the State of Wisconsin, being pages numbered 1 to 71 of the Record as certified to this Court, together with the opinion of the Supreme Court of the State of Wisconsin and the proceedings therein, comprising pages numbered 72 to 93 of the Record as certified to this Court.

#### B.

#### Reasons Relied On for the Allowance of the Writ.

1. The question presented is the constitutionality of the Wisconsin tax statute, Section 3 of Chapter 505, Laws of 1935 (as amended) as applied to the J. C. Penney Company, a Delaware corporation doing business in Wisconsin, under the facts as previously stated, and of the taxes of \$23,586.79 assessed against said corporation pursuant to said taxing act. The facts relating thereto are not in dispute and are contained in the record made before the Wisconsin Tax Commission. No issue as to the facts was raised or presented in the state courts of Wisconsin and none now exists or is here presented. Likewise, no question has been raised, and none exists, as to the correctness of the procedure in the assessment of the taxes involved or in the review of the assessment in the court proceedings. Consequently, a discussion of those procedural matters is not relevant to the purposes of this petition. The only controversy at issue involved in the proceedings in the state courts and presented to and decided by the Supreme Court of Wisconsin in rendering the judgment sought to be reviewed, is whether

the Fourteenth Amendment to the Constitution of the United States precludes the State of Wisconsin from imposing the tax as provided in Section 3 of Chapter 505, Laws of 1935, (as amended) upon the J. C. Penney Company, a foreign corporation, under the facts set out in the record. This is solely a question of law and purely a Federal question. The judgment of the Supreme Court of Wisconsin sought to be reviewed is based solely on its decision upon that question. The petitioners contend that its decision upon said Federal question is erroneous and should be reversed.

2. Following notice of the assessment of the taxes involved and upon appropriate request therefor by the J. C. Penney Company, a hearing in respect to said assessment was had and conducted by the Wisconsin Tax Commission, which by order, dated July 21, 1938, sustained the assessment. Thereupon, pursuant to the statutes of Wisconsin providing therefor, the J. C. Penney Company appealed from the decision of the Wisconsin Tax Commission to the Circuit Court for Dane County, Wisconsin, and the Supreme Court of Wisconsin, successively. In the application for hearing before the Wisconsin Tax Commission (R. 51), and in the notice of appeal from the order of the Wisconsin Tax Commission to the Circuit Court for Dane County, Wisconsin (R. 2), the claim was made by the J. C. Penney Company that Section 3 of Chapter 505, Laws of Wisconsin of 1935 (as amended) as applied to it under the existent facts purports to impose a tax beyond the taxing jurisdiction of the State of Wisconsin, and therefore is invalid as violative of the due process provision of the Fourteenth Amendment to the Constitution of the United States. The same claim was made on the appeal to the Supreme Court of Wisconsin, and its decision sustaining said claim of the J. C. Penney Company the petitioners contend is erroneous and should be reversed.



3. The Wisconsin Tax Commission held that it was without authority to pass upon the constitutional question involved (R. 20) and the Circuit Court for Dane County, Wisconsin decided it adversely to the corporation (R. 67), upon the authority of the decision of the Supreme Court of Wisconsin upon the question, rendered in 1936 in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. In the cited case the Supreme Court of Wisconsin in an action for declaratory judgment had expressly declared Section 3 of Chapter 505, Laws of 1935 (as amended) to be constitutional as imposing a tax within the taxing jurisdiction of the State of Wisconsin as applied to both foreign and domestic corporations, over objection that it violated the due process provision of the Fourteenth Amendment to the United States Constitution. Upon appeal by the J. C. Penney Company to the Supreme Court of Wisconsin from the judgment of the Circuit Court for Dane County, Wisconsin, confirming the order of the Wisconsin Tax Commission and the taxes as there sustained, the corporation renewed its objection that as applied to it Section 3 of Chapter 505, Laws of 1935 (as amended) and the taxes assessed pursuant thereto were violative of the due process provision of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Wisconsin sustained that objection and overruled its prior decision in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Comm.*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, insofar as that prior decision held that said law imposed a valid tax as applied to foreign corporations doing business in Wisconsin under facts the same as those existent as to the J. C. Penney Company (R. 77). The petitioners contend that this decision upon the Federal question involved and overruling the prior decision thereon is erroneous and should be reversed.

4. The said decision of the Supreme Court of Wisconsin to the effect that Section 3 of Chapter 505, Laws of 1935 (as amended) was invalid as applied to foreign corporations was based squarely upon the decision of this Court in the case of *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, which was decided by this Court subsequently to the decision in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Comm.*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. Upon the basis of the facts existing in the instant case the Supreme Court of Wisconsin held that the decision of this Court in the case of *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 was controlling and required it to overrule its prior decision upon the question and held that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), as applied to a foreign corporation doing business in Wisconsin in the manner of the J. C. Penney Company, imposes a tax beyond the taxing jurisdiction of the State of Wisconsin. It is the contention of the petitioners that the Supreme Court of Wisconsin erred in so construing and applying the decision of this Court in that case and that said decision is neither controlling nor applicable to the question here involved.

5. The petitioners, moreover, contend that no other decision of this Court holds that a tax such as that provided by Section 3 of Chapter 505, Laws of 1935 (as amended) as applied to foreign corporations doing business in the taxing State under and pursuant to the laws thereof, is contrary to the Fourteenth Amendment to the United States Constitution, and that no decision of this Court requires such a holding or sustains the decision of the Supreme Court of Wisconsin to that effect.

6. The petitioners further contend that although the precise question involved has not been passed upon by this



Court, the decision of the Supreme Court of Wisconsin that Section 3 of Chapter 505, Laws of 1935, (as amended) as applied to foreign corporations doing business in Wisconsin, is invalid as contravening the due process clause of the Fourteenth Amendment to the United States Constitution, is not in accord with applicable decisions of this Court and assign the same as error for which said decision should be reviewed and reversed.

Wherefore, Your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Wisconsin, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 96, August Term, 1939, *J. C. Penney Company, a foreign corporation, Appellant v. Wisconsin Tax Commission, Respondent*, and that the said judgment of the Supreme Court of Wisconsin may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE STATE OF WISCONSIN, and

ELMER E. BARLOW,

*As Commissioner of Taxation  
of the State of Wisconsin,*

By JOHN E. MARTIN,

*Attorney General of Wisconsin,*

JAMES WARD RECTOR,

*Deputy Attorney General of Wisconsin,*

HAROLD H. PERSONS,

*Assistant Attorney General of Wisconsin,*

*Counsel for Petitioners.*

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1939**

---

**No. 892**

---

**STATE OF WISCONSIN, AND ELMER E. BARLOW, AS  
COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,**  
*Petitioners,*  
*vs.*

**J. C. PENNEY COMPANY, A DELAWARE CORPORATION.**

---

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI.**

---

**I.**

**The Opinions of the Court Below.**

The opinion and dissenting opinion in the Supreme Court of Wisconsin, filed January 16, 1940, are reported in 289 N. W. 677, but are not as yet reported in the official State reports (R. 77).

**II.**

**Jurisdiction.**

1. This petition is filed pursuant to Section 237b of the Federal Judicial Code (28 U. S. C. A. 344 (b)) which provides:

“(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for

review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or *where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution*, treaties, or laws of the United States; or *where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution*, or any treaty or statute of, or commission held or authority exercised under, the *United States*; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on an appeal in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on an appeal might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph." (Emphasis ours.)

2. Petitioners also rely on Rule 38 of the Rules of this Court and particularly on Paragraph 5 thereof which provides in part:

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.

"(a) Where a State court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

3. The date of the judgment to be reviewed is January 16, 1940 (R. 77).

In its application for a hearing before the Wisconsin Tax Commission upon the assessment involved (R. 51) and in its pleadings upon the statutory appeal to the circuit court for Dane County, Wisconsin from the decision of the Wisconsin Tax Commission confirming the assessment (R. 2), the J. C. Penney Company, among other things, claimed immunity from the tax upon the ground that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), in so far as it imposed a tax upon the Company was contrary to the Fourteenth Amendment to the United States Constitution because it taxed beyond the taxing jurisdiction of the State of Wisconsin and thus deprived the J. C. Penney Company of its property without due process.

The Circuit Court for Dane County, Wisconsin upheld the validity of the tax in question as applied to the J. C. Penney Company upon the authority of *State ex rel. Froedtert G. & M. Co. Inc. v. Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, in which case the Supreme Court of Wisconsin in a declaratory judgment in 1936 had expressly sustained the validity of said tax law as applied to both foreign and domestic corporations over objection that it contravened the due process provisions of the Fourteenth Amendment to the Constitution of the United States (R. 67, 68).

The Supreme Court of Wisconsin, upon appeal from the Circuit Court, sustained the contention of the J. C. Penney Company and held that the said Section 3 of Chapter 505 (as amended), was invalid in so far as it purported to impose a tax upon the devolution of dividends of the J. C. Penney Company to its stockholders. The court thus expressly overruled its decision in the case of *State ex rel. Froedtert G. & M. Co. Inc. v. Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, and did so specifically upon the authority of *Connecticut*



*General Life Ins. Co. v. Johnson* (1938), 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 (R. 77).

Thus, a statute of the State of Wisconsin was held to be invalid upon the basis of an asserted conflict with the Fourteenth Amendment to the United States Constitution as interpreted by this Court.

The cases upon which petitioner relies in support of jurisdiction are:

*Blodgett v. Silberman* (1928), 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410;

*Boynston v. Hutchinson Gas Co.* (1934), 291 U. S. 656, 78 L. Ed. 1049, 54 S. Ct. 528;

*Kelly v. Washington ex rel. Foss Company* (1937), 302 U. S. 1, 82 L. Ed. 3, 58 S. Ct. 87;

*Coleman v. Miller* (1939), 307 U. S. 433, 83 L. Ed. 1385, 59 S. Ct. 972.

### III.

#### Statement of the Case.

The controversy at issue arose out of an assessment of taxes in the amount of \$23,586.79, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), against the J. C. Penney Company, a Delaware corporation, doing business in the State of Wisconsin under and pursuant to the laws of Wisconsin. A copy of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended by Chapter 552, Laws of Wisconsin, 1935), may be found in the Appendix herein. In substance, it imposes a tax on all corporations, foreign and local, equal to 2½% of the amount of dividends declared and paid out of income derived from property located and business transacted in the State of Wisconsin. The corporation declaring the dividend is made liable for the tax and required to deduct the same from the dividend.



The J. C. Penney Company, a Delaware corporation, requested a hearing upon the assessment before the Wisconsin Tax Commission (R. 51). The Wisconsin Tax Commission confirmed the assessment (R. 19). The J. C. Penney Company appealed to the Circuit Court for Dane County, Wisconsin, and, as appears from the record on said appeal (R. 2), it alleged that Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) so far as it imposed the tax upon the J. C. Penney Company, was in conflict with the Fourteenth Amendment to the United States Constitution because it imposed a tax beyond the state's jurisdiction to tax, and thereby deprived the company of its property without due process of law.

The circuit court for Dane County rejected the Company's claim of immunity from the tax, and confirmed the assessment (R. 67).

Upon appeal from the judgment of the circuit court the Wisconsin Supreme Court reversed the judgment of the circuit court and upheld the Company's claim to immunity from the tax. Thus, the court held that, in so far as the said Section 3 of Chapter 505 (as amended), imposed a tax upon the devolution of dividends from the J. C. Penney Company to its stockholders paid out of income earned in Wisconsin, it was contrary to the Fourteenth Amendment to the United States Constitution (R. 77). While other issues were raised in the case none was decided except the constitutional question to which reference has been made.

The facts upon which the Wisconsin Supreme Court predicated the immunity of the J. C. Penney Company from the tax imposed by the said Section 37, Chapter 505, are set out as follows in the court's opinion:

"The plaintiff operates its business in the following manner: the total proceeds from sales of goods in all its stores, including Wisconsin stores, are de-

posited in local banks. From such deposits payments are made,—payrolls, rents, advertising and other local expenses. The remainder not needed for such expenses is ultimately transferred to the treasurer's office in New York City and deposited in New York banks to the credit of the Company. No separate account is kept of the funds from the various states and moneys after leaving the local banks completely lose their identity with respect to being derived from a particular source. From the funds deposited in New York, salaries, general overhead expenses in New York and other offices, taxes and dividends are paid. Checks are drawn in payment for all merchandise purchased and shipped to the various stores. All of the stockbooks, minute books and secretary's records of the Company are kept in the state of New York, except that a duplicate stock ledger is kept in Delaware as required by that state. All transfers of shares of stock are made by the New York transfer agent of the Company; all directors' and stockholders' meetings are held in the State of New York and all dividends are declared at such meetings. The actual payment of dividends is effected by checks drawn upon the accounts of the plaintiff Company in New York, payable to the stockholders of record upon each dividend record date. Such checks are mailed to the postoffice address of each stockholder as the same appears in the record. No act in connection with the payment of dividends was performed within the state of Wisconsin and no act in connection with the receipt of such dividend was performed in the state of Wisconsin except that certain stockholders of the Company received their mail in this state. \* \* \* (R. 78-79).

#### IV.

##### Specification of Errors.

1. The Supreme Court of Wisconsin erred in holding that Section 3 of Chapter 505, Laws of Wisconsin, 1935,

(as amended by Chapter 552, Laws of Wisconsin, 1935) as applied to the J. C. Penney Company, under the existing facts, imposed a tax beyond the taxing jurisdiction of the State of Wisconsin and therefore is invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Wisconsin erroneously held that the assessment of the taxes involved, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended by Chapter 552, Laws of Wisconsin, 1935), against the J. C. Penney Company, a corporation, under the existing facts constitutes a deprivation of property of the J. C. Penney Company without due process of law because beyond the taxing power of the State of Wisconsin and therefore is invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

## V.

### ARGUMENT.

#### Summary of Argument.

POINT A. The Supreme Court of Wisconsin erroneously predicated its decision on the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) and the tax thereby imposed upon the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436.

POINT B. This Court has announced no decision construing the Fourteenth Amendment condemning the application of state tax laws such as Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) to foreign corporations doing business in the State in the manner of the J. C. Penney Company.

POINT C. On the contrary, applicable decisions of this Court sustain the validity of said Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) as applied to the J. C. Penney Company in the present case.

Point A.

The Supreme Court of Wisconsin erroneously predicated the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), upon the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 (1938).

The inapplicability of the case of *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, to the facts of the present case were so clearly pointed out in the dissenting opinion of Mr. Justice Fowler that we rest our argument of this point upon the language of his dissent. In referring to the differences in the two cases he said:

“ \* \* \* The object of the California tax was the reinsurance premium received and contracted for in the State of Connecticut. The receipt and the contract were in no way connected with, in no way incidental to any transaction of the insurance company in California, and were in no way connected with or incidental to any earnings of the company from business conducted in California. The object of the instant tax is the declaration of a dividend made in New York on earnings of the plaintiff corporation through business transacted in the State of Wisconsin. The declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed. The reason for the invalidity of the California tax does not apply to the instant case. The reason not applying, neither does the rule. So at least it seems to me. Under this



concept, the statute here involved remains valid unless subsequently declared invalid by the Supreme Court of the United States."

### Point B.

This Court has announced no decision construing the Fourteenth Amendment condemning the application of State tax laws, such as Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), to foreign corporations doing business in the State in the manner of the J. C. Penney Company.

It would, of course, be impossible, particularly within the limits of the argument here permitted, to analyze each of the decisions rendered by the United States Supreme Court construing the taxing power of the States and to show that none of such decisions condemns a tax such as is involved in this case. It should be sufficient to point out that prior to the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, the Supreme Court of Wisconsin had expressly held in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), was a tax on the devolution of income derived from business transacted within the State and sustained the validity thereof, as applied to foreign corporations over the specific objection that it violated the due process provision of the Fourteenth Amendment. The Supreme Court of Wisconsin in the instant case overruled its prior decision in that case as applied to the *J. C. Penney Company*, a foreign corporation, solely upon the basis that the decision of this Court in the case of *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, compelled and required it to do so. Thus, the only case



decided by this Court which has been thought to require the invalidation of Section 3 of Chapter 505, and the tax assessed thereunder is, as we have pointed out above, clearly distinguishable and inapplicable, and it is neither decisive of nor controlling on the question here presented. It is, of course, conceded by all parties involved in the present controversy that there has been no decision by this Court dealing with a State tax of the precise nature involved.

### Point C.

On the contrary, applicable decisions of this Court sustain the validity of said Section 3 of Chapter 505, Laws of 1935 (as amended), as applied to the J. C. Penney Company in the present case.

It was settled by this Court in the case of *Shaffer v. Carter*, (1920), 252 U. S. 37, 64 L. Ed. 445, 40 S. Ct. 221, that a State may impose a tax upon income derived from the transaction of business within its territorial jurisdiction. Thus it must be conceded that the State of Wisconsin has jurisdiction to tax the income of foreign corporations to the extent that such income is derived from business transacted within its territorial jurisdiction. In *State ex rel. Froedtert G. & M. Co. Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, the tax in question was held to be a tax on the devolution of income derived from business transacted in the State.

Had the tax in question been expressly denominated an income tax upon the Wisconsin income of the J. C. Penney Company, measured by a percentage of dividends declared out of that income and collectible at the time of declaring such dividends, there could hardly be a doubt but that the rule of *Shaffer v. Carter*, (1920) 252 U. S. 37, 64 L. Ed. 445, 40 S. Ct. 221, would apply.

The fact that the tax is not specifically so denominated is not important in this case. In the ultimate analysis, when a question is raised as to the taxing power of the State under the Federal Constitution, the question is resolved not upon the basis of definitions but rather upon the basis of the substance and operation of the tax imposed. The State has constitutional power to impose a tax upon the transaction of corporate business within its boundaries, and a tax which has the effect of taxing such business is within its power, irrespective of the particular form which it may take or of the particular label with which it may be designated. *Underwood Typewriter Co. v. Chamberlain*, (1920) 254 U. S. 113, 65 L. Ed. 165, 41 S. Ct. 45. Exactions imposed upon the transaction of corporate business assume many forms. Two such forms selected at random are those involved in *Atlantic Lumber Co. v. Commissioner of Corporations and Taxation*, (1936) 298 U. S. 553, 80 L. Ed. 1328, 56 S. Ct. 887; *American Manufacturing Co. v. St. Louis*, (1929) 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522. There are, of course, many others.

The Wisconsin Supreme Court in the case of *State ex rel. Froedtert G. & M. Co. v. Tax Commission*, (1936) 221 Wis. 225, (1936) 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, rests the authority to impose the tax exacted by Section 3 of Chapter 505 upon the power to tax the transaction of corporate business in the State of Wisconsin. Thus, the court said that the earning of the income subjected to taxation through the transaction of Wisconsin business was the essential foundation of the tax itself.

So regarded, the tax is, in substance, laid upon corporations doing business in the State of Wisconsin and measured by a percentage of dividends declared out of income so derived.

In its opinion in *State ex rel. Froedtert G. & M. Co. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267

N. W. 52, 104 A. L. R. 1478, the Wisconsin Supreme Court cited the case of *Barnes v. The Railroads*, (1873) 17 Wall. (84 U. S.) 294, 21 L. Ed. 544, as sustaining the view that the tax imposed by Section 3 of Chapter 505 was laid upon the corporation. That case is without any question authority for the proposition to which it was cited by the Wisconsin Supreme Court. And it involved a tax law identical in all essential respects. In the subsequent cases of *United States v. Railroad Company*, (1873) 17 Wall. (84 U. S.) 322, 21 L. Ed. 597, and *Stockdale v. Atlantic Insurance Co.*, (1874) 20 Wall. (87 U. S.) 323, the United States Supreme Court questioned its interpretation of the tax involved in *Barnes v. The Railroads*, (1873) 17 Wall. (84 U. S.) 294, 21 L. Ed. 544, but in *Railroad Company v. Collector*, (1879) X Otto (100 U. S.) 595, 25 L. Ed. 647, the court laid the issue at rest by returning to its position in the case of *Barnes v. The Railroads*, (1873) 17 Wall. (84 U. S.) 294, 21 L. Ed. 544.

The fact that the tax imposed upon the distribution of dividends by Section 3 of Chapter 505 is required to be deducted from the dividends paid does not alter its character as a tax upon the corporation for the transaction of business. The same situation existed in *Barnes v. The Railroads*, (1873) 17 Wall. (84 U. S.) 294, 21 L. Ed. 544.

If it be assumed, however, that the exaction imposed by Section 3 of Chapter 505 is laid upon stockholders of corporations for the privilege of transacting business in the State of Wisconsin in the corporate form, there is no reason why that brings it into conflict with the Fourteenth Amendment to the United States Constitution. The stockholders of corporations who do business in the corporate form in the State of Wisconsin enjoy valuable privileges under the law of Wisconsin. And they enjoy the protection

of Wisconsin law in acquiring income which they may distribute among themselves in the form of corporate dividends. Certainly, it is not inequitable to require such stockholders to compensate the State for the privileges which they may thus enjoy.

In *Miller v. Milwaukee*, (1927) 272 U. S. 713, 71 L. Ed. 487, 47 S. Ct. 280, it was held that the State of Wisconsin could not tax Wisconsin residents upon income received as dividends from a corporation which derived the income almost exclusively from tax exempt securities. Thus, the corporate veil was pierced and it was recognized that the stockholders were being taxed upon the income of tax exempt securities. If the corporate veil can be so pierced, we respectfully submit that it can be pierced to impose the tax here in question. If it can be recognized in the face of important considerations of public policy that the income of a corporation is, in effect, the income of its stockholders, then the stockholders of foreign corporations may be rightfully required to pay a tax which is based upon income received by them in the form of corporate dividends derived from corporate business transacted in the State of Wisconsin.

Courts frequently pierce the corporate veil, and we must consequently assume that the Fourteenth Amendment contains no prohibition against piercing it. A legislative body may likewise look at reality in the formulation of a tax policy which is in all respects just and equitable.

#### **Conclusion.**

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that to such end a writ of certiorari should be



granted and this Court should review the decision of the Supreme Court of Wisconsin and finally reverse it.

JOHN E. MARTIN,

*Attorney General of Wisconsin,*

JAMES WARD RECTOR,

*Deputy Attorney General of Wisconsin,*

HAROLD H. PERSONS,

*Assistant Attorney General of Wisconsin,*

*Counsel for Petitioners.*

**APPENDIX.**

Section 3, Chapter 505, Laws of Wisconsin, 1935, Effective on Its Publication on September 26, 1935, and as Amended by Chapter 552, Laws of Wisconsin, 1935, Effective on Its Publication on October 8, 1935, Provides:

- Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and

undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipt of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury.

***Blank Page***